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ABSTRACT

This report presents the case for preservation of tax incentives to giving for higher education. Following introductory material, chapter 2 reviews the nature of the present crisis in financing higher education and the vital importance of voluntary support. Chapter 3 presents arguments in favor of the charitable deduction as an incentive for voluntary support of higher education including a policy justification, efficiency of the tax provisions in generating the voluntary support, and equity of the charitable deduction. Chapter 4 reviews additional arguments in support of the deduction for appreciated gifts and the unlimited estate tax deduction, including the deductibility of the fair market value of appreciated property, and no limitation should be placed on the charitable deduction for estate tax purposes. (MJM)

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Tax Reform and the Crisis of Financing Higher Education

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Foreword

Both the public and the private members of the Association of American Universities are convinced that the uniquely American tradition of extensive private support for higher education preserves important values in our own society. Among them are diversity in higher education, maintenance of multiple sources of influence and decision, direct citizen participation and choice in financing higher education and voluntary redistribution of wealth from private hands. Our tax laws provide incentives to this private support, and these incentives must be sustained. We are dedicated to maintenance of the basic characteristics of the existing system until a better one is developed, and we have as yet seen no good substitute.

This report presents in direct and simple terms the case for preservation of tax incentives to giving for higher education, and we recommend it to those with an interest in the financing of higher education in the United States.

Herbert E. Longenecker

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TAX REFORM AND THE CRISIS OF FINANCING HIGHER EDUCATION

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TAX REFORM AND THE CRISIS OF FINANCING HIGHER EDUCATION

I. Introduction. The marginal financial condition of our colleges and universities is manifest. Their financial future is dangerously fragile. Many institutions confront the desperate prospect of constricted growth and even curtailment of vital functions.

The only rational passage through these perils is enormous increase in support for our public and private colleges and universities. In this context, it is absolutely essential to preserve existing sources of private support for higher education which are derived from the present tax system.

Persons responsible for these institutions are convinced -- and their conviction is corroborated by data -- that private support for higher education is vitally motivated by existing laws authorizing income, gift and estate tax deductions for private gifts to higher education. Especially important are tax provisions encouraging large gifts of appreciated property by individuals during their lifetime and by will. Experience demonstrates that significant curtailment of these tax incentives, even serious official consideration of such changes, has a chilling effect on private contributions.

Tax reform is one of those motherhood issues - it is very difficult to oppose. Debaters can make a theoretical point that the allowance of tax deductions for private gifts to higher education, particularly the deduction of the market value of appreciated property, creates an indirect government subsidy which is logically imperfect. But in the name of "tax equity," reformers may strike a crippling blow to our nation's system of higher education.

The existing system, as tightened and improved by the Tax Reform Act of 1969, has much to commend it. The present system should be further modified only when and if it can be empirically demonstrated that a significantly better alternative exists which will not diminish the present level of financial support for our colleges and universities and will not endanger academic freedom or impair the pluralistic character of our society.

II. The Present Crisis in Financing Higher Education

A. Nature of the Crisis.

In 1972 Congress itself recognized the potentially disastrous financial plight of our institutions of higher learning. The Education Amendments of 1972 take statutory notice of the "considerable evidence . . . which indicates that many institutions of higher education are in financial distress."[1/]

The House Report of the Committee on Education and Labor speaks in even more alarming terms: "Hundreds of institutions of higher education face financial crisis of severe proportions. Inflation and rising costs have put them in a classic cost-price squeeze."[2/]

The House Report contains a graphic summary of the "acute financial distress" and "endemic deficit financing" which now plague our colleges and universities.[3/]

> "An April 1971, survey by the National Association of State Universities and Land Grant Colleges indicates that in recent years university budgets must increase ten percent annually in order to maintain the same level of services. Forty-four of the 78 state universities and land grant colleges reported fiscal year 1971 budget increases of less than the required ten percent; three had decreases. A report at that same time on the status of New York private colleges and universities set the same figure of ten percent on the inflation rate.
>
> "Pressure from inflation and rising costs has been aggravated by a spectacular increase in enrollment. In fiscal year 1940, college enrollment was only 1.5 million. In 1959 those enrolled for degree credit were 3.377 million; in 1969, 7.299 million. The figure projected for 1979 is 11.075 million. At the University of California between fiscal year 1967 and fiscal year 1972, there will be a 34 percent increase in enrollment with only a 6 percent increase in budget (constant dollars) i.e. 20 percent less money per student.
>
> "The cost-price squeeze has had particular effect on the small private Liberal Arts college. Information available to the Committee indicates that in 1937-38, institutions enrolling under 500 students constituted 44 percent of the colleges and universities in the country and enrolled 18 percent of the students. Thirty years later they constituted 27 percent of the institutions and accounted for 2 percent of the students.

"Studies made by Dr. William W. Jellema for the Association of American Colleges indicate that, unless immediate aid is forthcoming, 365 of the nation's private colleges and universities may be closed in this decade. Two hundred of them will have exhausted their liquid assets within a year. Stated another way, of the private accredited institutions, 50 percent of four year institutions and 45 percent of those offering master's degrees in no more than three fields, 37 percent of those offering masters degrees in four or more fields, and 48 percent of the Ph.D. granting institutions, can be expected to fail within ten years.

"The problem is not limited to private colleges. Of 99 state universities and land grant colleges, five years ago none had an operating deficit. Last year a survey of 78 showed 12 in the red. Of 278 state colleges and universities, 75 percent say financial difficulty is their major problem.

"The financial crisis is manifested in deficit operation, curtailed services that adversely affect quality of education, and efforts to increase income that adversely affect the educational mission, such as raising tuition.

"Deficit operation is characterized — apart from bankruptcy — by invasion of endowment and increased borrowings. The study by Dr. Jellema for the Association of American Colleges entitled The Red and the Black released in January 1971, indicated that of 762 accredited private four year institutions, 24 percent were borrowing from endowment. A supplemental report released in late September entitled Redder and Much Redder indicated an average decline into deficit financing, 26 percent worse than had been anticipated by the institutions."4/

As an interim response to the financial crisis, Congress in 1972 authorized $40 million for "emergency" assistance to institutions of higher education which are in serious financial distress and in need of additional

assistance either to continue operation of the institution or to prevent substantial curtailment of academic programs.[5] At the same time Congress established the National Commission on the Financing of Postsecondary Education to report to Congress no later than April 30, 1973 on "the impact of past, present, and anticipated private, local, State and Federal support for postsecondary education. . . ."[6]

The provisions of the Education Amendments of 1972 require the Commission to evaluate proposals for financing higher education in terms of "the costs, advantages and disadvantages, and the extent to which each proposal would preserve the diversity and independence of such institutions."[7] It is the thesis of this paper that private support for higher education is essential to the congressionally proclaimed objective of preserving the "diversity and independence" of these institutions and that the charitable deduction is an essential means for enlisting that private support.[8]

B. The Vital Importance of Voluntary Support

Statistics compiled for all private universities show that government grants constitute about 45% of their total income compared to 34.4% from student fees; 11.8% from private giving; and 8.8% from endowment income.[9] The vital role of private giving both as a counterweight to increasing government support and as a significant source of income in absolute terms is plain from its relative dimension.

In 1970-1971, over $1.5 billion was volunteered from private sources for the support of the 1,080 institutions of higher education that participated in the annual survey of the Council for Financial Aid to Education.[10/] This sum represented 11% of the estimated $12.8 billion of expenditures made by these institutions in 1970-1971. Based on the average 4.7% yield for 1970-1971, this voluntary support represents the equivalent of an additional endowment of over $32 billion. The staggering importance of these gifts is dramatized by the fact that they are equal to almost 3 times the income produced by the $11.3 billion endowment reported by institutions of higher learning.[11/]

In 1970-1971 major private universities received over 40% of all voluntary support to higher education, and public colleges and universities received 22% of all such support. The distribution of these amounts among recipients of voluntary support of higher education in 1970-1971 is as follows:

Voluntary Support

Recipient	Percent
Major Private Universities	40.2
Private Coed Colleges	22.9
State Universities and Colleges	20.9
Other	16.0 12/
	100.0

The percentage of total expenditures financed by private giving, by type of institution in 1970-1971 is as follows (dollars expressed in millions):

Type	Private Giving	Expenditures	Percent
Major Private Univ.	$604.5	$2,961.2	20.3
Private Men's Col.	31.4	101.0	31.1
Private Women's Col.	56.8	225.3	25.1
Private Coed Col.	345.1	1,453.8	24.0
Prof. & Spec. Schools	118.2	433.4	27.2
State Univ. & Col.	314.1	7,095.8	4.4
Municipal Univ. & Col.	11.5	248.8	4.6
Junior Colleges	22.2	363.3	6.1
	$1,503.8	$12,882.6	10.5

13/

The message is clear: voluntary support plays a major role in the financing of public as well as private education.[14] All forms of higher education desperately need all the resources now available to them and dramatically more. They cannot afford any diminution of their funds from private charitable giving.

There is a particular need to preserve and increase large private gifts. The published report of the Council for Financial Aid to Education, Voluntary Support of Education 1970-1, supports the following conclusions outlined by Sheldon Steinbach of the American Council on Education and Julian H. Levi, of the University of Chicago.[15]

-- Higher education is dependent upon the large gift. While 95% of all gift transactions are for less than $5,000 in the aggregate these transactions produce

24.9% of all voluntary support, while only 4.73% of all transactions (those over $5,000) produce 75.04% of all voluntary support.

-- 51.2% of all voluntary support in 1970-1 consisted of gifts from individuals, alumni and non-alumni. In this category of donor the same pattern of reliance upon the large gift is maintained. Aggregate support from individuals, alumni and non-alumni, was approximately $787 million, of which amount $572 million came in transactions of more than $5,000.

-- As to gifts from individuals of more than $5,000 for current purposes, 48.92% of alumni gifts were in the form of securities, 3.25% in real estate and .40% in other property. In the case of alumni gifts of more than $5,000 for capital purposes, 58.38% were in the form of securities; 2.64% real estate and .133% other property. The same pattern exists as to non-alumni individuals.

The foregoing demonstrates beyond debate the significant role of large private donations in financing higher education; accordingly, it is crucial to evaluate any proposed tax change in terms of its impact on large private gifts and bequests.

III. The Charitable Deduction As An Incentive for Voluntary Support of Higher Education

In the midst of their present financial crisis, institutions of higher learning are being threatened with the loss of additional funds in the name of tax reform. Some writers and lawmakers are mounting an attack on three major provisions of existing federal tax law that relate to voluntary support of higher education:

(1) The deduction for income tax purposes of charitable contributions of individuals and corporations.

(2) The ability to deduct the fair market value of certain appreciated property donated to charity.

(3) The unlimited estate tax deduction for charitable gifts.

Although some observers deem the challenge to the charitable deduction as "incredible," there are certain scholars and lawmakers who persistently lump the charitable deduction with percentage depletion, accelerated depreciation, "stepped up" basis at death and other so-called tax "loopholes" which may be proper candidates for major tax reform. Specifically, in the name of propriety, efficiency and equity, these reformers variously argue for replacement of the present system of tax deductions by direct government expenditures alone, by a system of matching private donations with government grants outside of the tax system, or by a system of tax credits.

It should require no documentation to accept the recent conclusion of the United States Court of Appeals for the Fourth Circuit that:

> "[I]t would be naive not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed."16/

As John Gardner observed ten years ago:

> "The consequences of abolishing charitable deductions would be catastrophic for our educational, charitable and religious institutions, and would alter profoundly the character of American life."17/

Perhaps in recognition of the profound and catastrophic changes that could result, proposals to repeal the charitable deduction have remained in a largely incipient state. Nevertheless it is an appropriate occasion to answer the charge that the charitable deduction is inappropriate, inefficient, and inequitable.

A. Policy Justification: The Charitable Deduction as a Proper Use of the Tax Laws.

Critics of the tax provisions favoring charity allege that it is somehow improper to utilize the federal tax system to encourage private philanthropy. But our experience has demonstrated that use of the tax system to stimulate private philanthropy is, as a fundamental matter of policy, thoroughly justified.

-- Private philanthropy has been a cornerstone of our pluralistic society[18] which has been enriched by its diversity of ethnic, racial, religious and social groups.[19]

-- During the half-century of income taxation in the United States, our lawmakers have exercised care to insure not only that these institutions not be taxed but also that the tax system be utilized to encourage private giving to enhance the well-being of these institutions without undue government influence and control.

The debate on the Revenue Act of 1917 makes it clear that the introduction of the charitable deduction reflected a desire to protect the income of philanthropic organizations and in particular the income of educational institutions.[20] The attitude of the Senate seems to have been that income contributed to charity was income not properly taxable at the new, higher rates introduced during World War I. Senator Hollis, who introduced the amendment to permit the deduction of contributions to charity, perceptively stated:

> Look at it this way: For every dollar that a man contributes for these public charities, education, scientific, or otherwise, the public gets 100 percent; it is all devoted to that purpose. If it were undertaken to support such institutions through the Federal Government or local governments and the taxes were imposed for the amount they would only get the percentage, 5 percent, 10 percent, 20 percent, or 40 percent, as the case might be. Instead of getting the full amount they would get a third or a quarter or a fifth. [21]

Senator Hollis inserted into the Congressional Record an editorial from The Washington Post of August 25, 1917 that read in part:

> This country can not abandon or impoverish the great structure of private charity and education that has been one of the most notable achievements of American civilization. Therefore with every additional dollar the Government finds it necessary to take in taxation it becomes increasingly necessary to accept the principle of the pending amendment and leave untaxed that part of every citizen's income which he may give voluntarily to the public good. 22/

Periodically Congress has reviewed and reaffirmed the wisdom and propriety of the charitable deduction, recognizing that allowance of the charitable deduction relieves government from the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the government. Thus, in 1938 Congress stated, "The Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds." 23/ Again in 1969, Congress endorsed the basic principle of the charitable deduction, increasing the 30% limitation on charitable contributions to 50% in order to strengthen the incentive effect of the charitable contributions deduction for taxpayers. 24/

Those who would eliminate the tax incentives for charitable donations would upset the long and successful tradition of utilizing the tax system to support private

philanthropy. They would do so on the basis of conclusions that rest on three questionable assumptions: first, they assume that a system of direct government grants or matching grants for the support of philanthropy would produce at least the same level of support for charity; second, that such a system would be constitutional in the case of religious organizations; and, third, that such a system is, as a policy matter, preferable to the present policy of utilizing the tax system to provide incentives for private giving.

Even those who recommend replacement of the charitable deduction with a system of matching grants concede that any nontax substitute for the deduction of existing law must assure educational institutions of support equal to "that which they can reasonably anticipate from the present tax expenditure system."[25/] However, as noted by Professor Boris Bittker of the Yale Law School, "it would be difficult to devise a formula for matching grants that would produce, even in the aggregate, the same amount of revenue that charities now owe to the tax deduction, and it is almost inconceivable that this could be done for particular charities or even categories of charities."[26/]

The proponents of a system of direct government grants or matching grants also assume that there is no constitutional barrier to supporting religious institutions in this fashion, including religious institutions of higher

learning. However, as noted by Professor Bittker, there may be an "insuperable" constitutional obstacle to including churches and other religious organizations in any grant system.[27]

Some may welcome more direct government funding on the ground that centralized decision-making will produce a more efficient use of funds than can be expected from a variety of institutions which derive their funds from multiple and diverse sources. But it should be plain that a multiplicity of private institutions supported by a multiplicity of fund sources dilutes the actual and potential power of government to control or suppress diversity, individuality and academic initiative. Judge Friendly has cautioned of the danger "if the extension of the helping hand of the government, even when the help is monetary, were to turn our lively pluralistic society into a deadly uniformity."[28]

The history of federal programs suggests that increased direct government financing portends increased federal control. The Congress would face, more and more, the same kinds of pressures that confront state legislatures and forced the North Carolina legislature to enact a "gag rule" controlling "controversial" speakers on campuses of state colleges and universities.[29] Thus, the Governor's Committee on Higher Education in New York made a plea in 1969 that the State University of New York be disentangled from the snarled red tape of state bureaucracy

and enabled to act "with the spirit and style of our great public universities."[30/]

Indeed federal controls already exist. For example, the federal government has required that Armed Forces recruiting personnel not be barred by a college if it is to remain eligible for certain funds.[31/] Several writers have noted their concern for the lack of government restraint in matters affecting academic freedom:

> The one occurrence that has shaken my conviction that general federal aid to higher education poses no inherent danger to the freedom of universities has been the imposition of security clearances for those engaged in federally financed unclassified research. This whole episode in our history, now happily past, is repugnant because it involved an essentially immoral abandonment of the values without which our form of government and indeed our society cannot survive . . . . If general federal aid to higher education had been in force over the period 1951-1956, the freedom of American universities would have been seriously threatened. 32/

Institutions of higher education have, so far, maintained their integrity and independence despite the fact that over 45% of the funds of all private universities are from government grants. Any action which has the effect of further increasing their relative dependence on highly centralized government funding as distinguished from diverse private giving could upset the balance.[33/]

Moreover, elimination of the policy of promoting charitable giving to private institutions through the tax system could ultimately result in the loss of significant benefits to our society in the form of new ideas and programs. Terry Sanford, President of Duke University, in pleading the case for retention of the charitable deduction, has chronicled some of the benefits that have resulted in the field of education from our national policy of encouraging philanthropy.

> "[W]e might remember that our first American college resulted from private philanthropy, and so did many of our best schools that have been established since then. Mostly because of private gifts, which have been encouraged by tax relief, our private schools have been able to contribute a wealth of innovative ideas to our overall educational system. Public and state schools have in many instances acquired some of the most progressive practices by following the examples of private schools -- which were freer to experiment and innovate.
>
> A conscientious government is somewhat restrained in initiating new programs. Private philanthropy, however, has provided us with 'laboratory'-type experiments that have proven the public value of certain programs. Then, armed with that rationale, government has been able in good conscience to initiate similar programs to be financed with public funds. . . .
>
> If we are to retain the national strength we have derived historically and traditionally from pluralism, then we cannot afford new developments that would further homogenize American society. Certainly one of the most important assets of pluralistic influence in our nation is our dual system of private and independent institutions."34/

To a very important degree the cherished independence of our institutions of higher learning and their contribution to our society is a product of the private charitable support generated through the present tax system.

B. Efficiency of the Tax Provisions in Generating the Voluntary Support.

Those who challenge the charitable deduction and the measurement of income and estate tax deductions of gifts in kind by their market value sometimes urge these provisions are "inefficient": i.e., that a large portion of charitable gifts would be forthcoming absent these tax provisions and that the additional contributions stimulated by the tax provisions are too small to justify their cost in tax revenue.

Congress itself has recognized the incentive effect of the charitable deduction provisions. In the Tax Reform Act of 1969, it increased the 30% limitation on charitable giving to 50% "in order to strengthen the incentive effect of the charitable deduction provisions for taxpayers."[35/] In recommending this change, the Ways and Means Committee stated its belief "that the increase in the limitation will benefit taxpayers who donate substantial portions of their income to charity and for whom the incentive effect of the deduction is strong -- primarily taxpayers in the middle- and upper-income ranges."[36/]

However, respected economists who have attempted to measure the incentive effect of the charitable deduction have reached conflicting conclusions. Those who assert the charitable contribution deduction is inefficient rely heavily on the 1965 doctoral dissertation of Professor Michael K. Taussig and his conclusion that the tax incentive for charitable giving is weak, inducing only $57 million in gifts in 1962 while creating a revenue loss of $2.5 billion.[37] However, Dr. Taussig himself recognized that his findings were subject to significant qualifications and should not be made the basis for policy decisions.[38]

Dr. Taussig's reservations about his own analysis are confirmed by the conclusions reached in two subsequent studies by Professor R. A. Schwartz of New York University.[39] Professor Schwartz found that the charitable donations of both corporations and individuals were price elastic; that is, the less the cost to the giver, the larger the gift. His studies corroborate the intuitive judgment of many other experienced and qualified observers -- that increasing the "cost" of charitable donations will decrease their incidence and magnitude. Neither Dr. Taussig nor those who have adopted his conclusions without fully appraising his analysis have successfully refuted the common sense observation of Professor Boris Bittker that: "A taxpayer who can transfer $1 to his favorite charity at a cost to himself of only 50 cents will be

much more inclined to make the gift than one who must lay out a full $1 to transfer that amount.[40/] This is particularly true of donors in the higher income brackets who give the most and are most conscious of the effect of taxes on their cost of giving.

Moreover, the Taussig studies were based on data about giving to all charities, including religious institutions which rely to a greater extent on small gifts from moderate income taxpayers. Even Professor Taussig concluded that the incentive effect of the tax provisions is greatest for gifts to educational institutions, and that the incentive effect of the charitable deduction was substantial for high income taxpayers.[41/]

These observations about the motivation and source of gifts to higher education should not be underestimated. Higher education is dependent upon large gifts and large bequests. While gifts to higher education in amounts over $5,000 account for less than 5% of the total number of donations, they account for more than 75% of the dollar totals of all voluntary support.[42/] There is almost universal agreement that the favorable tax provisions have their greatest impact in stimulating these gifts.

There is other important corroboration for the view that gifts to higher education are large and tax induced. For example, a 1968 study by T. Willard Hunter, based on interviews with major donors, found that charitable gifts

would have averaged 42.5% less if they had not been tax deductible.[43/] While he found the decision to give to be tax motivated only in a subordinate way, he found the amount of giving and its timing to be greatly influenced by tax considerations. His findings tend to confirm the contention of university trustees and administrators that the present tax provisions provide a strong incentive effect. Hunter reported a "universal reaction of shocked disbelief that anyone could hold the charitable deduction not to be an incentive to philanthropy,"[44/] and his independent conclusions support their view.

The incentive effect of the charitable deduction finds further support in a 1969 survey conducted by the Commission on Foundations and Private Philanthropy under the Chairmanship of Peter Peterson. The survey made of a representative group of large donors indicated that if there were no tax benefits for charitable giving, only 4% of the donors would be unaffected in their giving. The remaining 96% indicated that they would reduce their giving by a median reduction of 75%. The survey also showed that approximately 70% of the direct gifts of large donors is in the form of appreciated property which reflects the incentive provided by the rules for deducting gifts of appreciated property.[45/]

Other data about voluntary support to colleges and universities further emphasize the significance of tax incentives. First, a disproportionate amount of giving characteristically occurs toward the end of the year when large donors and their financial and legal advisers are particularly aware of tax considerations. For example, in 1971-1972 Brown University, Massachusetts Institute of Technology, and Stanford University received more than 40% of all their contributions for those years during November and December.[46/]

More important for the present problem, this same 1970-1971 experience revealed that more than 50% of the gifts over $5,000 from individuals for current purposes were in the form of securities, real estate or other noncash property. More than 60% of the gifts over $5,000 from individuals for capital purposes were in the form of securities, real estate and other property.[47/] It is apparent from these facts that these gifts involved appreciated property, the donation of which was importantly motivated by favorable tax treatment afforded gifts of such property.

The importance of tax incentives to private giving is underlined by the experience of colleges and universities in years when revisions of the tax treatment of charitable contributions were publicly and officially considered. The hearings in connection with the Tax Reform Act of 1969 dealt with the tax consequences of deferred giving transactions. While deferred giving prior to 1967-1968 had grown

to 7.1% of total gifts by individuals, the results for each year thereafter represent a continuing significant decrease not only in the percentage of deferred giving (3.9% in 1970-1971), but also in absolute dollar amounts, even though total voluntary support from individuals increased. If the percentage of deferred giving support developed prior to 1967-1968 had continued in the three succeeding years, total support of higher education in this one form of giving in 1970-1971 would have been $50 million more than actually received.[48/]

The available data and informed judgments indicate that the charitable deduction is effective in raising critical funds for higher education. In the absence of any persuasive evidence that the tax incentives are ineffective in stimulating voluntary support, it would be precipitous and potentially calamitous to alter the existing tax incentives for charity on the untested theory that some other system might be more efficient.

C. Equity of the Charitable Deduction.

Those who would alter the tax incentives for charitable contributions also contend that the present law is inequitable. According to Professor Stanley S. Surrey of Harvard, "[t]he charitable contribution deduction is a special tax provision not required by, and contrary to, widely accepted definitions of income applicable to the determination of the structure of an income tax."[49/] Professor Surrey describes the charitable contribution deduction as a subsidy to charitable giving and thus to the

activities of qualified charitable organizations. He compares the deduction to a matching grant program under which the government makes matching grants to charities chosen by taxpayers, and suggests that this is an inequitable matching grant program since it conditions the amount of the government's grant directly on the taxpayer's marginal income tax rate. A 70% bracket taxpayer can contribute $100 with an after-tax cost of $30, but a 30% bracket taxpayer will have an after-tax cost of $70 for making the same contribution.

Other respected tax scholars, including Professors Boris Bittker of Yale and William D. Andrews of Harvard, have contested this characterization. Professor Andrews has stated: "I do not believe, nor do I think most serious practical students of the subject believe, that the charitable contribution deduction is as irrational as this explanation makes it sound."[50/] Professor Andrews points out that "the fact that a provision does more to mitigate differences among wealthy people than among the less well-to-do is simply a characteristic of a graduated rate schedule, whatever may be included in the income tax base."[51/] For example, if a wealthy man in the 70 percent bracket incurred a deductible loss of $1000, the Government would absorb $700 of the loss, but in the case of a 30% taxpayer the Government would absorb only $300.

Professor Andrews challenges the Surrey view that the charitable contribution is a tax subsidy

inconsistent with a system of graduated taxation of net income.[52/] Since the government does not tax individuals on what they do not consume because they decline to earn it, it should not tax what is theoretically income but is devoted to public charity rather than to personal consumption or accumulation. In the case of donations to education, religion or culture, the benefits produced have the character of common goods whose consumption by one individual does not preclude consumption by others. Therefore no one individual should be taxed as if he had consumed the goods to the preclusion of all other consumers.

If we are not willing to tax a person on income he could have earned, but did not (because he chose leisure time and decreased income instead of increased income), we should not tax him on income he earned but chose not to keep by voluntarily giving it to a public charity, such as a college or university. In the case of the man who chose leisure time, we give him a tax break for being less productive. Now some propose to penalize the highly productive man who shares the fruits of his labors with charity. Rather than viewing the charitable contribution deduction as a loophole for the wealthy, we should view the amounts donated as an additional tax -- albeit a voluntary one -- paid by individuals to provide goods and services for the benefit of the

public that would otherwise necessarily be furnished by government.

In viewing the practical consequences of a change in the charitable deduction in general or the appreciated property rules in particular, another significant point must be considered. In the case of voluntary support of higher education, obtaining these funds from wealthy individuals by giving them tax incentives not only provides additional funds for public purposes, it also accomplishes a voluntary redistribution of wealth from the donor to the students educated by the charitable gift.

The large gifts from individuals which account for such a substantial portion of voluntary support for educational institutions provide facilities and services that, if provided from tax revenues, would come largely from taxes on low and middle income groups. When a private university such as the University of Buffalo or Pittsburgh is forced because of inadequate voluntary support to close or become a state institution, the effect may be to substitute a regressive source of state funds, such as the property tax, for a progressive source of private funds.[53/] The following tables illustrate this phenomenon.

Contributions to Education as a Percent of Adjusted Gross Income[54]

AGI	Percent
Under 3,000	Less than .05
3,000-5,000	Less than .05
5,000-10,000	Less than .05
10,000-15,000	.1
15,000-25,000	.1
25,000-50,000	.3
50,000-100,000	.6
100,000-150,000	1.1
150,000-200,000	1.5
200,000-500,000	2.1
500,000-1,000,000	2.2
Over 1,000,000	2.4

State and Local Taxation as a Percentage of Family Personal Income [55]

Income	Percent
Under 2,000	11.3
2,000-3,999	9.4
4,000-5,999	8.5
6,000-7,999	7.7
8,000-9,999	7.2
10,000-14,999	6.5
15,000 and over	5.9

Accordingly, departure from the existing charitable deduction rules may have an inequitable effect not acknowledged by the critics, i.e., shifting support of higher education from high-bracket taxpayers to state governments relying on more regressive taxes to fill the void.

Critics concerned with tax equity should concentrate their efforts on the many tax preferences used by high income taxpayers to profit themselves. The tax deductions for charitable giving do not profit the individual

taxpayer, rather they benefit the educational, religious and scientific institutions so critical to our nation's well-being. When an individual contributes to a college or university he achieves no monetary gain for himself. The effect of charitable contributions is the redistribution of wealth, not the conservation of wealth. To institutions of higher learning, suggested changes in the tax provisions do not raise esoteric questions of tax equity; they raise fundamental questions about the continuation of significant private support for our system of higher education.

IV. Additional Arguments in Support of the Deduction for Appreciated Gifts and the Unlimited Estate Tax Deduction

We have detected no visible momentum for the proposition that the charitable deduction should be eliminated in favor of a system of direct or matching government grants. However, more limited proposals have been advanced in Congress to perform what some might mistakenly regard as minor, less risky surgery -- changing the rules for the taxation of appreciated property and the unlimited charitable deduction of the estate tax. Because higher education relies so heavily on the large gift and large bequest, any change in these areas could have major adverse consequences.

A. The Deductibility of the Fair Market Value of Appreciated Property Should Be Preserved

Since 1923, a taxpayer who contributed appreciated property to charity has been allowed a charitable contributions deduction for the fair market value of the property with no tax imposed on the appreciation.[56/] Although this rule was modified by the Tax Reform Act of 1969 for some charitable contributions, higher education continues to enjoy contributions stimulated by the allowance of a charitable deduction for the fair market value of certain appreciated property.

Some critics assert that the rules for deducting gifts of appreciated property exacerbate the problem of inequity since the appreciation escapes capital gains tax, while an income tax deduction is allowed equal to the present value of the property contributed. It is thus argued that giving appreciated property to charity produces a more favorable result for the taxpayer than selling the property and donating the cash proceeds to charity, and discriminates against the wage earner who does not have appreciated property and must make his contributions from after-tax dollars. Accordingly, some have proposed to reduce the amount of the charitable deduction for gifts of appreciated property by one half of the appreciation that would have constituted taxable gain upon sale of the property.

A review of the history of the appreciated property rule leads to the conclusion that the present law is the

product of reasoned Congressional deliberation and should be retained, especially in light of the precarious financial health of institutions of higher education and their dependence on gifts of appreciated securities and real property.

In 1938 the House of Representatives accepted the same proposal for change which is being advocated today, voting to limit the deductibility of appreciated gifts to charity to the adjusted basis of the property in the taxpayer's hands. However, the Senate Finance Committee, out of concern for the adverse consequences to charitable giving, rejected the House proposal:

> "Representations were made to the committee by officials of educational and charitable institutions that the effect of such a provision would be to discourage the making of charitable gifts in kind. The committee believes that charitable gifts generally ought to be encouraged and so has eliminated this provision of the House bill." 57/

The House receded and Congress in 1938 voted to continue to allow the full deductibility of the appreciation element of gifts in kind as an important incentive to charitable giving.

The full deductibility of gifts of appreciated property remained intact until the Tax Reform Act of 1969. In connection with that Act, Congress conducted a searching reexamination of tax policy with respect to exempt organizations and their contributors. Three major changes effected in that act are highly relevant here. First,

deductions based on gifts of appreciated property whose sale would have produced ordinary income (e.g., inventory items) were limited to the donor's cost basis. Second, deductions for donations of appreciated capital gains property to private nonoperating foundations were reduced by 50% of the appreciation element in the value of the gift. Third, the deduction for gifts of tangible personal property, the use of which is unrelated to the exempt purpose of the charitable donee, was reduced by 50% of the appreciated amount of the gift.

In 1969 the House (as it had in 1938) again approved reduction of the tax benefits for appreciated property donated to public charities and universities. Kingman Brewster, President of Yale, responded to the House action:

> "It has been argued that it is somehow 'unfair' for the person who has untaxed appreciated capital to be able to convert the appreciation component into a tax deduction, whereas those with only cash income must make their gifts, if at all, from after tax resources. Again this argument loses force in view of the fact that unrealized gains would not be taxed ..., unless sold or given away; so that the choice is not whether to put the man with unrealized gains in the shoes of the man with cash income only, but whether the former will be given some incentive to convert his privilege for the public benefit through a charitable gift."[58]

Ultimately, Congress, after deliberate consideration, decided prior law should be retained to allow a deduction equal to the fair market value of gifts of appreciated securities and real estate when made to public charities and

operating foundations. However, Congress did limit use of this appreciated property rule. Although the Tax Reform Act generally increased the charitable deduction limitation from 30 percent of the taxpayer's adjusted gross income to 50 percent, the 30 percent limitation remains in effect for gifts of appreciated property unless in computing the amount of the contribution the appreciation element is reduced by one-half.

Even if granting a deduction for appreciated property favors the high bracket taxpayer who can afford to make such gifts, this theoretical inequity is dwarfed by the benefits to higher education of the appreciated property rules and the potentially ruinous loss of private support that could result from change in those rules. In the words of Professor Bittker, the inequity is not "intolerable"; more weight should be given "to the practical consequences of a change, than to its contribution to 'tax purity'; 'tax logic,' or definitional elegance."[59/] In this instance the financial needs of higher education and its reliance on gifts of appreciated property[60/] far outweigh any asserted inequities of the deduction. It is plain common sense to preserve a tax system which stimulates voluntary gifts of appreciation to charity.[61/] Making it more costly for a rich man to give money to charity does not make it less costly for a poor man to do so; such tax changes will only reduce the amount flowing to charity from those who can best afford it.[62/]

The present treatment of appreciated property reflects the considered judgment of Congress, which examined the issue in depth in 1938 and again only four years ago. In the circumstances, private support of charity in general and higher education in particular should not be subjected to the chilling effect of still another public battle unless there is some new and imperative justification. There is none.

B. No Limitation Should Be Placed on the Charitable Deduction for Estate Tax Purposes

Under present law, which has been in effect since 1918, a deduction is allowed from the gross estate of a decedent for the present value of property transferred for certain charitable purposes. The estate tax deduction is not subject to any percentage limitation. In contrast, the charitable deduction for income tax purposes is generally limited to 20% of the donor's adjusted gross income in the case of gifts to private foundations, 30% in the case of gifts of certain appreciated capital gains property such as securities, and 50% in the case of gifts to public charities and operating foundations.

Some, perhaps influenced by a sense of symmetry, have proposed that some or all of the income tax law limitations be extended to the estate tax. For example, it has been proposed that the aggregate charitable deduction should not exceed 50% of the gross estate reduced by the debts of the decedent and the expenses of administration.

In 1970-71, $266 million in bequests were received by the 1,080 institutions of higher learning participating in the annual study of the Council for Financial Aid to Education. This constituted 17.6% of the total private support for all of these institutions; 24.8% of the private support enjoyed by 58 major private universities and 9% of the support of 224 state-controlled public institutions.[63/]

Bequests are the largest single source of endowment funds of most private colleges and universities. Their experience with bequests is similar to their experience with lifetime gifts: the lion's share of large bequests comes from a relatively few large estates.

The experience of the California Institute of Technology is typical of the pattern of giving common to most colleges and universities. Eugene F. Gerwe, Director of Income Trusts and Bequests, reports that in the period from January 1966 through June 1972, Caltech received 50 bequests. Eleven bequests, however, provided over 90% of the funds produced by bequests. Caltech's share in each of these estates exceeded 50% of the gross estate. Mr. Gerwe estimated that, had those estates been limited to a charitable contribution deduction of 50% of the taxpayer's total estate, Caltech would have lost $2,250,000.

Caltech's records also indicate that a number of persons plan to leave over half of their total estates to charity; the anticipated bequests total $60 million. If estate tax deductions for gifts to charity were limited to one half of the estate, those estates would pay almost $14 million in additional federal taxes. "These taxes would be paid by funds that would otherwise have gone to the charitable organization; thus, the tax would, in effect, be paid by the charitable organizations."[64/]

To the extent that a basic purpose of the estate tax is to prevent the undue concentration of accumulated family wealth, that purpose is accomplished whenever a decedent gives the bulk of his estate to independently controlled institutions such as privately endowed universities instead of to his heirs. Any reduction in the estate tax charitable deduction would work contrary to the purpose of the estate tax in preventing the undue concentration of accumulated family wealth, since,with no tax incentive to make gifts to charity in excess of the limitation, testators might well decide to keep their "charity at home."

The rationale for limiting the income tax deduction for charitable gifts to 50% of the taxpayer's adjusted gross income does not carry over to the estate tax arena. The unarticulated premise of the income tax limitation is that no taxpayer should be allowed to completely avoid his annual obligation as a citizen to pay some federal

taxes even if he gives his entire income to charity.

There is no similar principle that every citizen pay the one-time estate tax. The estate tax is, after all, imposed only on the decedent's property at death; assets consumed or given away prior to that time are not taken into account. Similarly, the $60,000 estate tax exemption indicates there is no underlying rationale that each person should pay some estate tax. Since a person during his lifetime can transfer his entire estate to charity over a period of years and thus avoid the estate tax entirely,[65/] there is no compelling reason why an estate tax should be imposed if the entire estate is transferred to charity at death since such a transfer effects the redistribution of wealth which is the primary purpose of the estate tax.

In the estate tax context, any limitation on the charitable deduction would result in the direct imposition of a tax on charity. Each dollar of tax imposed on the estate would take a dollar from charity, a result which is wholly inconsistent with the exemption from taxation of the income of charitable organizations.

The conclusion that the unlimited estate tax deduction should be retained is confirmed by the conspicuous silence of the 1968 Treasury Department tax study of estate and gift tax reform with respect to any change in the unlimited estate and gift tax deductions afforded transfers to charity.[66/]

Equally significant is the fact that the American Law Institute, after 5 years of study of federal estate and gift taxation, recommended in 1969 that

> "the 100% charitable deduction in the field of transfer taxation should be retained, under either a dual tax system or a unified tax." 67/

Even under the most drastic proposals for estate and gift tax reform -- proposals to replace the estate and gift taxes with an accessions tax which would treat a gift or bequest as income to the recipient 68/ -- the burden of taxation on gifts to charities would not be increased. Not even the most avid tax reformers have suggested that the income of charities be taxed. As long as the exemption remains, treating a bequest as income to the recipient would not change the tax-free nature of charitable bequests, and it would be possible for an individual to bequeath his entire estate to charity free of tax -- the proper result.

The evidence seems overwhelming that the unlimited charitable deduction for estate tax purposes should be preserved for bequests to public charities in light of the compelling financial needs of higher education and the complete absence of any overriding principle of tax equity supporting any limitation.

V. Conclusion

Both practical and philosophical considerations compel retention of the existing tax incentives for private support for charity in general and higher education in particular. There is strong evidence that proposals to limit the income, gift and estate tax deductions now afforded for individual gifts to charity would seriously reduce those gifts, particularly large individual gifts which have proven so important to institutions of higher education. Congress has recognized that the nation's institutions of higher education constitute a "national resource which significantly contributes to the security, general welfare, and economy of the United States."[69/] To conserve this resource, any funds depleted through changes in the tax laws must be replaced from other sources. However, none of the tax reform proposals has answered the pivotal question of how revenues lost to higher education would be replaced as would be required by the national interest.

The present charitable deduction is time-tested and has the virtue of certainty; donors, their attorneys and university officials know the system and its potential for financing higher education. Other ideas for direct subsidies, matching grants and the like are unknown quantities likely to produce new inequities with absolutely no guarantee that they would raise the same revenue for higher education as the present system. They would be susceptible to proof

and perfection only after long and intensive trial and error. There is too much at stake to overthrow our traditional support of private charity through the charitable deduction. No less than the vitality and independence of higher education are in the balance.

Footnotes

1/ Education Amendments of 1972, Pub. L. 92-318; 86 Stat. 235, § 122(a)(1)(B) [hereinafter cited as Education Amendments of 1972].

2/ H.R. Rep. No. 554, 92d Cong., 2d Sess., 6 U.S. Code Cong. & Admin. News 2243 (1972). Figures indicate the costs of providing education are repeatedly outpacing sources of income, resulting in much more severe cost pressures on higher education than on the balance of the economy. See William G. Bowen, Economic Pressures on the Major Private Universities, Hearings on Economics of Financing Higher Education Before Joint Economic Comm., 91st Cong., 1st Sess 399 (1969) [hereinafter cited as Bowen]. During the period of 1959-1967 expenditures of institutions of higher education increased at an average annual rate of 15.3% while total income increased at an average rate of only 14.6%. See Becker, The Financing of Higher Education: A Review of Historical Trends and Projections for 1925-76, in Trends on Postsecondary Education 98 (1970). It is anticipated that future expenses of educational institutions will increase by 11.7% annually while income will increase by only 5.8% to 7.6%. See Bowen at 422, 436.

3/ H.R. Rep. No. 554, 92d Cong., 2d Sess., 6 U.S. Code Cong. & Admin. News 2201 (1972). The financial ills of higher

education have been amply documented by a number of authors, each urging the same general conclusions as to the seriousness of the problem. See, e.g., R. H. Atwell and C. W. Atwell, Adjustments of the Major National Universities to Budgetary Distress (1972); G. Hudgins, I. Phillips and J. Bruntlett, Peoples Colleges in Trouble (A Financial Profile of the Nation's State Universities and Land Grant Colleges) (1970); W. W. Jellema, The Red and the Black (Special Preliminary Report on the Financial Status of Private Institutions of Higher Learning) (1971); W. W. Jellema, Redder and Much Redder (1971). One commentator has suggested that the immediate financial crisis may have eased for some institutions. Professor Earl F. Cheit, under the sponsorship of the Carnegie Commission on Higher Education, has recently completed a followup report on the financial condition of 41 public and private colleges and universities which he surveyed two years ago. Compare The New Depression in Higher Education -- Two Years Later (1973) with The New Depression in Higher Education (A Study of Financial Conditions at 41 Colleges and Universities), Carnegie Commission on Higher Education (1971). The report concludes that, through strenuous cost-cutting measures including deferral of faculty salary increases and maintenance costs, the schools' financial deterioration has been slowed and a certain degree of "fragile stability" has been achieved, at least for the short run. The stability is fragile, in the view of Professor Cheit, because it is the result of unusual cuts in expenditure growth and is based in part on favorable assumptions concerning

inflation, enrollment, and the level of private, state and federal support. For example, the report notes that the stability is based in part on a recent upturn in private contributions to colleges and universities -- an upturn which would be threatened by serious consideration of proposals to alter the charitable deduction.

4/ H.R. Rep. No. 554, 92d Cong., 2d Sess., 6 U.S. Code Cong. & Admin. News 2243-44.

5/ Education Amendments of 1972, § 122.

6/ Id. at § 140(a)(1). It is interesting to note that in establishing the National Commission on the Financing of Postsecondary Education, Congress implicitly recognized the potential importance of the charitable deduction by granting the Commission authority to accept in the name of the United States grants, gifts or bequests. Section 140(b)(3).

7/ Education Amendments of 1972, § 140(a)(2).

8/ See text and footnotes infra at pp. 9-15.

9/ Bowen at 424. A recent survey of the income sources of three private universities indicates that a dramatic shift has occurred in the sources of income of institutions of higher learning. Endowments which produced 46.8% of the income of Chicago, Princeton, and Vanderbilt for 1939-1940 accounted for only 13.4% of the income of these institutions in 1965-1966. In contrast, government grants and contracts

accounted for a startling 45.9% of the 1965-1966 income of these private universities compared to the 1.4% provided from government sources in 1939-1940. Private gifts and grants were a remarkably stable source over this period, dropping only modestly from 13% of the income of these universities in 1939-1940 to 12.5% in 1965-1966. The marked increase in the dependence of these private universities on government support is a pattern which is reflected in the experience of all private universities as indicated in the following table from Bowen at 424:

TABLE 4.—*Sources of current income,*[1] *selected years—(percentage distribution)*

	Chicago-Princeton-Vanderbilt (average)[2]					All private universities	
	1965-66	1955-56	1948-49	1939-40	1924-25	1963-64	1955-56
A. Educational and general income from all sources:							
1. Government grants and contracts	45.9	24.4	13.0	1.4	.....	45.1	27.2
2. Student fees	22.7	26.8	39.9	35.8	50.6	34.4	43.9
3. Endowment income	13.4	23.3	29.2	46.8	43.5	8.3	13.2
4. Private gifts and grants	12.5	20.3	16.0	13.0	2.2	11.8	15.8
5. Other	5.5	5.2	2.0	3.1	3.8	.....	.....
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
B. Educational and general income excluding Government grants and contracts:							
1. Student fees	41.5	35.5	45.6	36.4	50.6	62.6	60.2
2. Endowment income	25.1	30.4	33.1	47.3	43.5	15.9	18.1
3. Private gifts and grants	23.3	26.9	19.1	13.2	2.2	21.4	21.7
4. Other	10.1	7.1	2.3	3.1	3.8	.....	.....
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0

[1] Excludes income used for capital expenditures, and income derived from the operation of hospitals and auxiliary enterprises.
[2] Includes only Princeton and Vanderbilt in 1924-25 and 1939-40.

NOTE.—Detail may not add to total because of rounding.

The Bowen study is corroborated by other experience. The Atwells in Adjustments of the Major National Universities to Budgetary Distress (1972) report the following. Endowment income has dropped over the period 1961-1968 from 12.0 to 8.9 percent of the income of four major private national universities: University of Chicago, the Johns Hopkins University, Stanford University and Vanderbilt University;

gifts remained constant at 12 percent; federal funds rose from 31.9 to 34.7 percent of their income. Among four major public universities (University of California (Berkeley), University of Minnesota, University of North Carolina and University of Washington) endowment income remained constant at 1 percent; state support declined from 49 to 41 percent while federal support rose from 21 to 26 percent; gifts declined from 3.6 to 2.2 percent.

10/ Council for Financial Aid to Education, Voluntary Support of Education 1970-1971 at 4 [hereinafter called CFAE Survey]. It is estimated from this study that the probable total of voluntary support for higher education in 1970-1971 was $1.86 billion for all U.S. colleges and universities. Id. at 2.

11/ Id. at 62-63.

12/ Id. at 70. The figures in the table are tabulated for the 1,080 institutions of higher education that took part in the survey.

13/ Id. at 62-63 (percentages calculated from columns 1 and 2).

14/ As an example of the importance of private giving to public universities, the University of Virginia received 9% of its income in 1969-1970 from private gifts and endowment income (excluding revenue from hospital patients and

auxiliary enterprises). See Edgar F. Shannon, Jr., University of Virginia President's Report 20 (1972).

15/ Letter dated January 16, 1973, from Julian H. Levi to Undersecretary of the Treasury Edwin S. Cohen and Assistant Secretary for Tax Policy Frederic Hickman.

16/ Bob Jones University v. Connally, 73-1 USTC ¶9185 at 80,289 (4th Cir. 1973).

17/ Hunter, The Tax Climate for Philanthropy xviii (Am. College Public Relations Ass'n 1968) [hereinafter Hunter].

18/ Alexis de Tocqueville's perceptions of philanthropy in American society in 1831-1832 were as follows:

> "Americans of all ages, all conditions, and all dispositions, constantly form associations. . . . The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to difuse books, to send missionaries to the antipodes; they found in this manner hospitals, prisons, and schools . . . Wherever, at the head of some new undertaking, you see the government in France or a man of rank in England, in the United States you will be sure to find an association." Democracy in America, P. Bradley, ed., Vol. II, p. 108 (1963).

See also Vol. I, Chap. 12. Tocqueville comments: "Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away." Ibid., Vol. II, p. 109.

19/ Emerson Andrews has catalogued some of the benefits that we owe to private philanthropy:

> ". . . public libraries, growing largely out of gifts of buildings by Andrew Carnegie and his Carnegie Corporation of New York; the conquest of hookworm, the discovery of insulin, the successful war against yellow fever, chiefly with Rockefeller funds; John Brown's Body, perhaps our finest epic poem, written on a Guggenheim Foundation fellowship; New York City's Regional Plan, developed by Russell Sage Foundation when there was no interstate planning agency; the reform of medical education sparked by the explosive survey made by Abraham Flexner for Carnegie Foundation for the Advancement of Teaching; better salaries for college teachers, brought to the national conscience by the Ford Foundation's massive gift of $260 million; and just yesterday and today support for research on DNA (deoxyribonucleic acid), a key to genetics and perhaps to life itself." Emerson Andrews, The Bulletin, American Association of Fund Raising Counsel, Inc., pp. 1, 2 (February 1966).

20/ 55 Cong. Rec. 6728 (1917).

21/ Id.

22/ Id.

23/ H. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

24/ Staff of the Joint Committee on Internal Revenue Taxation, General Explanation of the Tax Reform Act of 1969 75 (1970).

25/ McDaniel, Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems, 11 B.C. Ind. & Com. L. Rev. 867, 880 (1970).

26/ B. Bittker, Charitable Contributions: Tax Deductions or Matching Grants? 28 Tax L. Rev. 37, 42 (1972)

[hereinafter cited as Bittker]. Professor Bittker's article presents one of the most articulate and reasoned defenses of the charitable deduction.

27/ Bittker at 40-43. As Professor Bittker further points out, difficult as it would be because of constitutional difficulties to enact a system of matching grants that included churches, it would be equally difficult to enact a system without them. This may be especially true in light of the fact that religious causes receive the major share of charitable support -- in 1967 receiving 47% or $6.8 billion of total giving compared to 18% or $2.6 billion for education at all levels. Hearings on Tax Reform Before the House Committee on Ways and Means, 91st Cong., 1st Sess., pt. 4, Statements of John J. Schwartz, Vice President, American Association of Fund Raising Counsel, 1448-49 (1969).

28/ Friendly, The Dartmouth College Case and the Public - Private Penumbra, 12 Texas Quarterly (2d Supp.) 141, 171 (1969). The deadly uniformity of which Judge Friendly warns has already surfaced in other countries, such as Sweden. Swedes have expressed growing concern over the increasing governmental control in their country. In the field of education, "there are grumbles that uniformity and equality have replaced individuality. Everything--curriculum, staffing, the quality of school meals--is set by the Government." One Swedish father has been quoted as saying "the private schools

are ending in favor of state schools. I pay 50 per cent of my salary in taxes . . . there is no choice for me on how the money I earn should be used. This is a limit on my freedom." Terry Sanford, The Luxury of Doing Good, Address to the 1972 Business Professions and Trades Dinner National Conference of Christians and Jews, Chicago, Illinois, November 29, 1972, quoting a recent article in the New York Times.

29/ General Statutes of North Carolina § 116-199 (1966).

> "The board of trustees of each college or university which receives any State funds in support thereof, shall adopt and publish regulations governing the use of facilities of such college or university for speaking purposes by any person who:
>
> (1) Is a known member of the Community Party
>
> (2) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina;
>
> (3) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to Communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or any executive or administrative board of the United States or any state."

In Dickerson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968), the statute and regulations adopted pursuant to it were found unconstitutional because of vagueness.

30/ M. M. Chambers, Higher Education, Who Pays? Who Gains? 122 (1968). The problem of legislative harrassment of education

is so persistent that ten states have granted state-supported institutions constitutional status. See Chambers at 215.

A typical example of a constitutional provision is that of Michigan; Art. 8 § 5 provides: "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan ... Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. . . ."

The significance of constitutional status for colleges and universities was discussed in Recent Decision Note, 55 Mich. L. Rev. 728 (1957):

> "When a state constitution grants to a state university the authority to govern itself through its board of regents or a similar body, that university is generally classified as a constitutional corporation. It has been said that such universities . . . constitute a fourth branch of the government, coordinate in some respects with the executive, legislative, and judicial branches."

31/ The National Aeronautics and Space Administration Authorization Act for 1969, Act of July 3, 1968, Pub. L. No. 90-373, § 1(h), 82 Stat. 281; The 1971 Military Procurement Authorization Act, Act of Oct. 7, 1970, Pub. L. No. 91-441, § 510, 84 Stat. 914.

> "Although enacted federal legislation on campus unrest may create informational and administrative difficulties for institutions, none previously discussed here have exacted financial penalties from the institutions themselves. Of the bills proposed in the Ninety-first Congress, however, the largest group made this extension of federal financial retraction. The bills generally would have eliminated federal aid to educational

> institutions which failed to discipline students under existing federal statutes within a reasonable time. Of this group of twenty-one proposals, eleven specified that disruptive teachers would also be denied federal assistance. Four bills conditioned federal aid upon maintenance of a particular program, such as ROTC or defense related research."

Comment, 119 U. Pa. L. Rev. 1003, at 1012. See B. R. Hopkins, J. H. Myers, Governmental Response to Campus Unrest, 22 Case W. Res. L. Rev. 408 (1971).

32/ C. V. Kidd, American Universities and Federal Research (1959) as cited by K. H. Ashworth, Scholars and Statesmen 18 (1972).

33/

> "But the significant threat is not palpable control. The significant threat is the impalpable influence of government. The resources of government are so great that the universities in their growth and in their direction may lose the power or the will to be self-determining. They can allow central power to determine the direction of their own work, of their own growth and development. If this happens, no one will be better off . . ."

C. Frankel in E. N. Shiver ed., Higher Education and Public International Service (1967) as cited by K. H. Ashworth, Scholars and Statesmen (1972), pp. 22-23.

34/ Terry Sanford, The Luxury of Doing Good, Address to the 1972 Business Professions and Trades Dinner National Conference of Christians and Jews, Chicago, Illinois, November 29, 1972.

35/ H. Rep. No. 91-413 (Part 1), 91st Cong., 1st Sess. 51 (1969).

36/ Ibid.

37/ Taussig, The Charitable Contributions Deduction in the Federal Personal Income Tax 185-86 (unpublished M.I.T. doctoral dissertation 1965).

38/ Taussig, Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions, 20 Nat'l Tax J. 1, 19 (1967) [hereinafter Taussig]. "The evidence presented in this paper, even if it were not subject to many serious qualifications, is not as good as we might like for policy decisions." For a critical review of the Taussig thesis, see Bittker at 49-51.

39/ Schwartz, Corporate Philanthropic Contributions, 23 J. Finance 479 (1968). Schwartz, Personal Philanthropic Contributions, 78 J. Pol. Econ. 1264 (1970).

40/ Bittker at 52.

41/ Taussig at 18.

42/ See pages 7-8, supra.

43/ Hunter at 117-18.

44/ Hunter at 43.

45/ Commission on Foundations and Private Philanthropy, Foundations, Private Giving, and Public Policy, A Summary of Findings and Recommendations 6-7 (The University of Chicago Press 1970).

46/ Unpublished studies of gifts by the named universities. See also Hunter at 132:

> "One university official says, 'Those who feel that the tax benefits of a deduction are of no great moment or consequence haven't taken a good look at the gift income figures of our respective institutions for the month of December. The lines nearly go off the top of the charts.'"

47/ See pages 7-8, supra. The significance of gifts of securities to institutions of higher education is confirmed by the following survey presented in 1969 by President Kingman Brewster of Yale:

LEVEL OF SECURITIES GIVING BY INDIVIDUALS TO SELECTED COLLEGES

Institution	Years involved	Value of securities donated by individuals	Ratio of securities to total gifts from individuals (percent)
California:			
Mills	1966-69	$1,695,000	55
Santa Clara	1967-69	143,000	6
Stanford	1966-69	9,037,000	52
U S C	1966-69	6,100,000	55
U S F	1966-69	130,000	10
Connecticut			
Connecticut College	1965-69	610,268	27
Hartford College	1966-69	129,000	34
New Haven College	1966-69	52,266	55
Trinity College	1966-69	2,867,105	49
University of Hartford	1965-69	1,300,000	49
Wesleyan University	1968-69	1,150,000	50
Yale University	1967-68	13,243,705	69
Massachusetts:			
Boston College	1968-69	450,000	39
Brandeis University	1968-69	12,000,000	58
Harvard University	1968-69	15,000,000	63
Holy Cross	1968-69	275,000	24
M I T	1968-69	7,170,000	70
Smith College	1966-69	2,684,063	46
Wentworth Institute	1968-69	502,206	92
Pennsylvania:			
Haverford	1966-69	3,565,000	71
Juniata	1968-69	200,000	53
Lehigh	1966-69	7,900,000	46
Pennsylvania	1966-69	16,000,000	53
Philadelphia College of Pharmacy	1966-69	3,700,000	80
Swarthmore	1966-69	2,051,000	43

115 Cong. Rec. 26203 (1969).

48/ Levi letter supra at n. 15.

49/ Surrey, Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 Harv. L. Rev. 352, 384 (1970).

50/ Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 345 (1972) [hereinafter cited as "Andrews"].

51/ Andrews at 339.

52/ Although Andrews argues that the charitable deduction in general can be viewed as a proper measure of net income and not a tax subsidy, he characterizes the rules for the deduction of the fair market value of appreciated property as a subsidy or artificial inducement for philanthropic giving. Andrews at 372.

53/ State funds constitute the major source of funds available to public institutions of higher learning. See Paul F. Mertins and Norman J. Brandt, "Financial Statistics of Institutions of Higher Education, Current Funds, Revenue and Expenditures 1968-69," U.S. Dept. of H.E.W., Office of Education, Table 1, p. 15.

Percentage Distribution, Sources of Income, Public and Private Institutions of Higher Education, 1968-69

Source	Type of Institution		
	Public	Private	Aggregate
Student Tuition and Fees	14.6%	45.3%	25.5%
Governmental Appropriations, Research and Student Aid	74.6	22.6	55.9
(Federal)	(18.1)	(20.2)	(18.8)
(State)	(50.4)	(1.8)	(32.9)
(Local)	(6.0)	(.6)	(4.1)
Endowment Income	0.6	7.7	3.2
Private Gifts	1.0	11.6	4.8
Other	9.2	12.8	10.6
Total	100.0%	100.0%	100.0%

This table shows that 50.4% of the income of public institutions of higher learning is derived from state tax revenues.

54/ U.S. Treasury Department, Statistics of Income, 1962 (Individual Tax Returns). Table E.

55/ Maxwell, Financing State and Local Government 49 (1965).

A more recent study has confirmed the finding that state and local taxes are regressive. In 1968 a study was done by Roger Herriot and Herman Miller to correlate by income bracket, taxes paid, income received, and government benefits received. It is the inclusion of the last element, government benefits received, which makes this table not directly comparable to the data Maxwell cites.

Tax Payments as Percent of Factor Income Plus Transfers by Adjusted Money Income Bracket, 1968

Income	Percent Paid in State & Local Taxes
Under $2,000	13.3%
2,000-3,999	10.5%
4,000-5,999	10.1%
6,000-7,999	9.8%
8,000-9,999	9.6%
10,000-14,999	9.6%
15,000-24,999	9.1%
25,000 and over	7.3%

Source: Advisory Commission on Intergovernmental Relations; A Report Presented to The President's Commission on School Finance, State-Local Revenue Systems and Educational Finance, p. 2-13, Table 2-6, (as revised Dec. 30, 1971).

56/ Art. 251, Regulations 45 (1920 edition), T. D. 3490, II-1 C.B. 118 (1923).

57/ Sen. Rep. No. 1567, 75th Cong., 3d Sess. 14 (1938).

58/ Letter from Kingman Brewster, President of Yale University, dated August 26, 1969, to Charls Walker, then Under Secretary of the Treasury, printed in 115 (Part 19) Cong. Rec. 26202 (1969).

59/ Bittker at 63.

60/ See pp. 2-8, supra.

61/ Some indication of the potentially disastrous effect of altering the rules for appreciated property can be gleaned from the experience of libraries and museums which have apparently encountered a significant reduction in the donation of authors' manuscripts and papers as a result of the Tax Reform Act of 1969. The 1969 Act provided that no deduction is allowed for the amount of any appreciation in the case of gifts of appreciated property which would have produced ordinary income if sold (including artistic works, letters, and memoranda). Because of the adverse impact of this provision on charitable giving, Chairman Mills recently has introduced H.R. 3152, 93d Cong., 1st Sess., to allow a deduction for one-half of the appreciation in the case of certain charitable contributions of "ordinary income" property, such as a literary, musical or artistic composition, or a letter or memorandum, created by the personal efforts of the donor.

62/ One donor, the late W. G. Bosworth of Sebastian, Florida, has expressed what would have happened to his donation if he could have deducted only $600,000 (his cost) of the $1 million worth of real estate he gave to Florida State University (Tallahassee) in 1965. His contribution would have

been "zero." "It would be like going back and throwing away twenty years of work and investments." Hunter at 123.

63/ CFAE Survey at 62-63.

64/ Gerwe, Major Tax Reform Affecting Colleges and Universities 8 (unpublished paper Nov. 1972).

65/ See §§ 170 and 2522 of the Internal Revenue Code.

66/ Joint Publication of Committee on Ways & Means and Senate Finance Committee, Tax Reform Studies and Proposals U.S. Treasury Department, February 5, 1969, Part 3, p. 381.

67/ American Law Institute, Federal Estate and Gift Taxation 6 (The American Law Institute 1969).

68/ See id. at 446.

69/ Education Amendments of 1972, § 122(a)(1)(A).

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